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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 450

LOGAN LANES, INC.,	*Petitioner,*
VS.	
BRUNSWICK CORPORATION,	*Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Respondent.

PETITION FOR A WRIT OF CERTIORARI
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for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on May 5, 1967.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in CCH 1967 Trade Cases, par. 72,091. A copy of the opinion is attached hereto as Appendix A. An unreported memorandum opinion was issued by the District Court for the District of Idaho. A copy of the District Court opinion is attached hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 5, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Is a discriminatory sale of recreational equipment to a State University for use in its Student Union Building exempt from the Robinson-Patman Act as amended by Section 13c (15 U.S.C. §13c) if that equipment is used in direct and open competition with private commercial establishments operating in the same locality?

2. Was the Court of Appeals correct in its conclusion that the degree of public use of recreational equipment on a university campus is immaterial in determining whether the purchase of that equipment falls within the "institutional" exemption of the Robinson-Patman Act?

3. Did the Court of Appeals, in affirming a Summary Judgment for respondent on the sole ground that a discriminatory sale of equipment to the Utah State University for use in its Student Union Building was exempt from the Robinson-Patman Act, improperly disregard the fact that petitioner charged respondent with other discriminatory sales to which no such exemption does or could apply?

4. Did the Court of Appeals improperly affirm a Summary Judgment for the respondent in this matter where the complaint properly charged violations of the federal antitrust laws and the Summary Judgment was granted without petitioner having been allowed any discovery in connection with those charges?

5. Was petitioner improperly denied its constitutional right to a jury trial on its antitrust claims against the respondent?

STATUTES INVOLVED

The statutory provisions involved are Section 2 of the Clayton Act, 38 Stat. 731, §2 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526, §1 (1936), 15 U.S.C. §13 (1952), and as further amended by 52 Stat. 446 (1938), 15 U.S.C. §13c (1964), and Section 4 of the Clayton Act, 38 Stat. 731, §4 (1914), 15 U.S.C. §15 (1952). These statutes are set out in Appendix C.

STATEMENT

Proceedings Below

This is an action for treble damages brought by petitioner against the respondent Brunswick ("Brunswick") for violations of the federal antitrust laws and more particularly for price discriminations prohibited by the Robinson-Patman Act (15 U.S.C. §13 et seq). (R. 4-13). Jurisdiction of the District Court was invoked under Section 4 of the Clayton Act (15 U.S.C. §15).

Petitioner commenced discovery proceedings against Brunswick by service upon it of extensive interrogatories and requests for admission of facts (R. 15-31). The requests for admission were directed to the sale of bowling and other recreational equipment by Brunswick to the Utah State Building Board for ultimate installation in the Student Union Building of the Utah State University. (R. 21-31). The interrogatories were not so limited, and sought

factual information on other sales by Brunswick in Utah and Idaho over the period 1958-64 (R. 15-19).

On the day Brunswick was to have answered petitioner's interrogatories and requests to admit, it filed a motion to dismiss and a motion for extension of time to answer those interrogatories and requests. (R. 34, 36). Petitioner then filed a motion for an order compelling Brunswick to answer the interrogatories (R. 38). Petitioner amended its complaint in certain particulars (R. 43-52), and Brunswick addressed a motion to dismiss to the amended complaint (R. 53). After hearing, the District Court denied petitioner's motion to compel answers, granted the motion of Brunswick for an extension of time to answer interrogatories *until ten days after a ruling on the motion to dismiss,* and granted the motion to dismiss, treating it as one for Summary Judgment pursuant to Rule 56, Federal Rules of Civil Procedure. (R. 65, 98-103). Appeal was then taken by petitioner from the Summary Judgment *and* from the discovery rulings of the District Court. (R. 105). Jurisdiction of the Court of Appeals was invoked under 28 U.S.C., Sections 1291 and 1294.

The Court of Appeals affirmed the Summary Judgment in favor of respondent Brunswick. (Appendix A). It sustained the Summary Judgment on the basis of the "university exemption" contained in Section 13c of the Robinson-Patman Act (15 U.S.C. §13c) and it therefore did not reach any question of governmental exemption. The Court of Appeals did not rule on the separate appeal taken by petitioner from the discovery orders of the District Court.

I. THE COURT OF APPEALS ERRONEOUSLY CONSTRUED THE "INSTITUTIONAL" EXEMPTION OF SECTION 13c OF THE ROBINSON-PATMAN ACT TO APPLY TO A DISCRIMINATORY SALE OF RECREATIONAL EQUIPMENT USED BY A UNIVERSITY IN DIRECT COMPETITION WITH PETITIONER'S PRIVATE BUSINESS.

A. Legislative History Demonstrates the Exemption Was Not to Apply in Competitive Situations.

Congress, in enacting the Robinson-Patman Act in 1936, intended that it apply in *all* instances where price discriminations were likely to cause substantial competitive injury. See S. Rep. No. 1502, 74th Cong., 2d Sess. (Jan. 16, 1936); H. R. Rep. No. 2287, 74th Cong., 2d Sess. (March 31, 1936); and Report of Conference Committee, H. R. Rep. No. 2951, 74th Cong., 2d Sess. (June 8, 1936).

Congress was similarly concerned with competitive injury in 1938 when it passed Section 13c, the "institutional" exemption, by way of amendment to the Robinson-Patman Act. That section provides:

> "Nothing in sections 13-13b and 21a of this title, shall apply to purchases *of their supplies for their own use* by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit." (Emphasis added)

The pertinent House and Senate Committee reports on the measure indicate an intent to extend the institutional exemption only so far as not to interfere with the over-all purposes of the Robinson-Patman Act in preventing anti-competitive price discriminations. In House Report No. 2161 of the Seventy-Fifth Congress, Third Session, issued on April 19, 1938, after a brief statement regarding the over-all purposes of the Robinson-Patman Act, the Committee reported:

> "The Committee does not feel that the wholesome purpose of the Robinson-Patman Act will be interfered with by the enactment of this bill to make certain that favors in price which are occasionally extended to eleemosynary institutions, because of the character of the institutions, do not fall under the ban of the Act."

Senate Report No. 1769, dated April 20, 1938, after similar statements regarding the general purposes of the Robinson-Patman Act, continued as follows:

> "The purpose of the Robinson-Patman Act, to prohibit price discrimination between purchasers in interstate commerce where competition would thereby be lessened, does not seem to apply as to eleemosynary institutions, as they are not operated for profit."

The legislative history of the Robinson-Patman Act itself demonstrates that sales to the government were intended to be exempted therefrom only to the extent that the goods purchased were used by the government for its own purposes and not in competition with private concerns. (See colloquy between members of Congress and H. B. Teagarden, chief lobbyist for the bill, *Hearings before the House Committee of the Judiciary on Bills to Amend the Clayton Act, 74th Cong., 1st Sess.* 208-9, 1935; the colloquy is attached hereto as Appendix D).

The clear congressional aim in passing both the Robinson-Patman Act and the "institutional" exemption thereto was to prohibit price discriminations in competitive situations and allow them, to a limited degree, in non-competitive situations.

The exemption was obviously a matter of grace, ostensibly provided for the benefit of nonprofit charitable institutions who could not compete, or for whom it would be detrimental to compete, with private enterprise for the

purchase of supplies presumably put to eleemosynary uses. In enacting this "institutional" exemption, Congress never envisioned that it would be used as a shelter by a discriminating seller or an institutional purchaser therefrom which, albeit non-profit in nature, is nevertheless in strenuous competition with private business.

B. The Exemption Has Not Previously Been Applied to Competitive University Facilities.

In the only previous case to consider the "institutional" exemption of Section 13c, the Court of Appeals for the District of Columbia held the exemption inapplicable to discriminatory sales of law books to "self-sustaining" campus book stores for resale at a profit. *Students Book Company v. Washington Law Book Co.*, 232 F.2d 49, 50 n. 5 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 988 (1956). In that case, the favored book stores, just as the bowling lanes in the instant case, were university facilities. After a full development of the facts by discovery and jury trial, however, the Court found the purchases were non-exempt because the books involved were being resold as a general source of revenue and were not merely purchased by the universities "for their own use, i.e., for their libraries." Petitioner submits that this interpretation of the "institutional" exemption, limiting it to the purchase of *non-competitive supplies*, is proper and that the decision of the Court of Appeals in the present case is in conflict with the *Students Book Company* decision.

Public use of university athletic and recreational facilities has, in analogous cases, deprived a university of a tax exemption almost identical in language to that of Section 13c. See *Trustees of Rutgers University v. Piscataway*, 46 A.2d 56 (N.J. 1956); and *In re White's Will*, 195 N.Y.

S.2d 349 (1959). When a bowling alley and other recreational facilities contained in a Student Union Building are restricted in use and purpose *exclusively* to university personnel and educational purposes, such an exemption is not lost. *People v. University of Illinois Foundation,* 58 N.E. 2d 33 (Ill. 1944).

C. Application of the Exemption Could Not Properly Be Determined While a Fact Issue Remained as to the Degree of Public Use of the Recreational Facilities.

Although not allowed discovery on the subject, petitioner by affidavit raised a substantial and genuine issue of material fact in this case regarding the extent of public use of the recreational facilities involved. (R. 55-64). Those affidavits demonstrate conclusively that the university bowling alleys and other facilities were used by the general public, that the university made no attempt to limit those facilities to its "own use" and that, to the contrary, the facilities were used in at least a semi-public manner in direct competition with the facilities of petitioner.

No single issue of fact in this case could be more material in determining whether the exemption should or should not apply than the issue of public use of the recreational facilities involved. Yet the Court of Appeals dismissed the clear issue of fact in the record on this matter as *immaterial.* (Appendix A, p. 7). To sustain a Summary Judgment in the face of an issue of fact on such a critical matter is obvious error.

The respondent's argument that the university facilities involved in this case were not used in competition with those of petitioner for the patronage of the general public, and are therefore entitled to the benefit of exemption under Section 13c, plainly denies reality. One need look only to the economic consequence of the price discriminations

practiced by Brunswick to determine whether the university bowling alleys were truly in competition with petitioner. Petitioner's business has been destroyed just as surely by this favored institutional competitor as it would have been by a favored commercial competitor.

II. PETITIONER'S ACTION ENCOMPASSED NUMEROUS OTHER DISCRIMINATORY SALES IN INTERSTATE COMMERCE WHICH WERE IGNORED BY THE DISTRICT COURT AND THE COURT OF APPEALS.

In its Amended Complaint in this matter, petitioner charged the respondent Brunswick in general terms with violations of the antitrust laws of the United States and more particularly with price discriminations in violation of Section 2(a) of the Robinson-Patman Act (15 U.S.C. §13(a)). (R. 43-52). *In so doing, petitioner did not confine its charges of discriminatory sales to those transactions involving the Utah State University.* Petitioner clearly charged Brunswick with other discriminatory sales in interstate commerce which did not and could not have fallen within the so-called "institutional" exemption upon which the decision of the Court of Appeals was based nor the "governmental" exemption upon which the District Court alternatively grounded its decision. (R. 43. See particularly paras. 7, 10, 12 and 13 of the Amended Complaint). *Both the District Court and the Court of Appeals have plainly ignored the fact that petitioner plead and sought to prosecute such other discriminations.*

At the very time Summary Judgment was granted, the District Court had before it certain discovery requests of petitioner for information regarding discriminatory sales by Brunswick in interstate commerce to favored purchasers

other than the State of Utah or the Utah State University. (R. 15-19, 38-42, and 65). By its Interrogatories Nos. 52 to 58 incl., petitioner specifically requested that Brunswick set forth the sales price and other information on each of its interstate sales of bowling equipment to customers in northern Utah and southern Idaho during the period 1958-64. (R. 16 and 18). Such territorial price information as petitioner was seeking is clearly relevant to a claim against an interstate seller under the Robinson-Patman Act. *Utah Pie Co. v. Continental Baking Co., et. al,* 87 S.Ct. 1326 (1967).

When petitioner's interrogatories were not timely answered by Brunswick, petitioner moved the lower court for an order compelling answers thereto. (R. 38). Although already in default on its answers, Brunswick filed a motion for an extension of time within which to answer the interrogatories. (R. 36). In an incredible display of judicial anxiety, the District Court denied petitioner's motion and allowed Brunswick an extension of time for answering the petitioner's interrogatories until ten days *after* a ruling on Brunswick's motion to dismiss. (R. 65). In so doing, the Court commented that "if it makes some difference on the motion to dismiss, that is too bad." (R., Vol. II, Reporter's Transcript of Proceedings, May 20, 1966, at page 7). The District Court then proceeded to hear and grant Brunswick's motion to dismiss, later treated as a Motion for Summary Judgment. (R. 98-103).

It was clear error for the District Court to grant Summary Judgment for the respondent as to the entire action based upon a consideration of only *one* of the discriminatory transactions charged. (R. 98-103). That error is compounded by the fact that the Summary Judgment was granted in the face of, and while the court *held in abeyance*

petitioner's discovery demands for information regarding other discriminatory sales by Brunswick, the development of which would have rendered Summary Judgment in this matter unthinkable. The rulings of the lower court on those discovery demands unduly restricted the scope of petitioner's case and deprived it of an opportunity to demonstrate the existence of numerous material issues of fact. The prejudice to petitioner of those discovery rulings cannot be overstated.

After entry of the Summary Judgment herein, petitioner *separately* appealed from that judgment and from the Orders of the District Court with respect to those discovery matters encompassing other areas, other customers, and other price discriminations. (R. 105). In its Statement of Points on Appeal, petitioner expressly raised the error of the lower court with respect to these other matters (R. 114-115), but the Court of Appeals either refused to consider those points without comment or completely disregarded them.

III. SUMMARY JUDGMENT AGAINST AN ANTITRUST TREBLE DAMAGE CLAIMANT WHICH HAS NOT BEEN ALLOWED DISCOVERY IS WHOLLY IMPROPER.

This Court has held that a private treble-damage claimant should not be deprived of a jury trial by Summary Judgment in an antitrust case where "... motive and intent play leading roles . . . and hostile witnesses thicken the plot." *Poller v. Columbia Broadcasting System,* 368 U.S. 464, 473 (1962). Summary Judgment should be granted sparingly in antitrust cases, *Poller v. Columbia, supra; White Motor Co. v. United States,* 372 U.S. 253 (1963) and is inappropriate where the plaintiff has not been afforded

a full opportunity to formulate his charges. *McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332, 339 (4th Cir. 1959); *Waldron v. British Petroleum Co.*, 231 F.Supp. 72 (D. N.Y. 1964); *Curto's, Inc. v. Krich - New Jersey, Inc.*, 193 F.Supp. 235, 238 (D. N.J. 1961); and *Philco Corp. v. Radio Corporation of America*, 34 F.R.D. 453 (E.D. Pa. 1964).

The action of the District Court in this case in granting Summary Judgment for respondent while holding in abeyance petitioner's initial discovery demands is in outrageous discord with the above authorities and the affirmation of that action by the Court of Appeals demands a review by this Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals in this case is the first federal appellate court decision to apply the "institutional" exemption of Section 13c of the Robinson-Patman Act (15 U.S.C. §13c (1938)), and the Court of Appeals in its decision erroneously construed this federal law in a number of important respects.

2. This case presents the Court with the opportunity to define the scope and proper application of the "institutional" exemption of the Robinson-Patman Act (15 U.S.C. §13c, (1938)), important matters of federal law which have not been, but should be, settled by this Court.

3. The decision of the Court of Appeals for the Ninth Circuit in this case is in conflict with the decision of the Court of Appeals for the District of Columbia in *Students Book Co. v. Washington Law Book Co.*, 232 F.2d 49 (1955), *cert. denied*, 350 U.S. 988 (1956).

4. In affirming a Summary Judgment against a private treble-damage claimant under the federal antitrust laws without allowing that claimaint any discovery, the Court of Appeals in this case has so far departed from accepted judicial procedure and from previous decisions of this Court in cases of this nature as to call for an exercise of this Court's supervision.

CONCLUSION

For the foregoing reasons the petition for a Writ of Certiorari should be granted.

Dated: August 1, 1967.

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RICHARD W. GIAUQUE

Attorneys for Petitioner

(Appendices A, B, C and D Follow)

Appendix A

LOGAN LANES, INC., an Idaho Corporation, *Appellant*, vs. BRUNSWICK CORPORATION, a Delaware Corporation, *Appellee*.	No. 21,168

(May 5, 1967)

Appeal from the United States District Court for the District of Idaho, Eastern Division

Before: POPE, HAMLEY and BROWNING, Circuit Judges

HAMLEY, Circuit Judge.

This is a suit brought by Logan Lanes, Inc. to recover treble damages in the sum of approximately $600,000 from Brunswick Corporation (Brunswick) for the alleged violation of section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (Act), 49 Stat. 1526 (1936), 15 U.S.C. §13(a) (1964).[1] It arises from a sale of bowling lanes and related equipment by Brunswick to Utah State Building Board (Board), at lower prices than Brunswick charged plaintiff Logan Lanes, Inc., for similar equipment. The Board is an agency of the State of Utah. The district court granted summary judgment for Brunswick, and Logan Lanes appeals.

In its amended complaint, Logan Lanes made the following allegations of fact, among others: Brunswick is en-

[1] In its brief in this court, Logan Lanes also invokes section 2(c), (d) and (e), but we find nothing in the allegations of the amended complaint which would bring these subsections into play.